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Court Review: Volume 40, Issue 2 - Complete Issue

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Court Review

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

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Court Review

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

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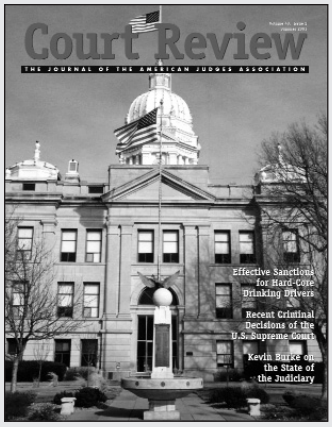
EDITOR'S NOTE

Kevin Burke is one of the success stories of the judiciary. A judge for almost 20 years, he retains his zeal and commitment to public service. In addition, he is the master of intelligent innovation. As chief judge of the state trial courts in Minneapolis, in recent years he has brought social scientists into the court to study things like the effects of judicial demeanor on impressions of fairness in the court; previously, he was one of the early pioneers in the drug-court movement. Burke's record of service led to his receipt of the 2003 William H. Rehnquist Award for Judicial Excellence, the highest award given to a state-court judge by the National Center for State Courts.

We begin this issue by reprinting Burke's remarks at the Rehnquist Award ceremony. Burke tries to identify the key ingredients needed to let a court fulfill its promise to the public. His list includes fairness and respect, listening and understanding, and accountability. We think you'll find his comments of interest. We invite your response, either via a letter to the editor or a responsive essay.



Researchers Robyn Robertson and Herb Simpson of the Traffic Injury Research Foundation present the findings of a survey of more than 900 judges on impediments to effective sanctioning of drunk drivers. Their article reviews both the views of judges and a summary of some of the existing research related to these problem areas. Take a look at what other judges think about the problem areas, then let us know if your experience suggests some effective solutions. Again, letters to the editor are welcome here.

We close the issue with Professor Charles Whitebread's annual survey of the past year's criminal decisions of the United States Supreme Court. Although there were no landmark decisions, it is always helpful to have a quick review of the most recent decisions.

I will close this column with a note about a coming event and special issue of *Court Review*. As part of the American Judges Association's annual conference this October in San Francisco, we will present a National Forum on Judicial Independence. This forum will be unique because it will focus on threats to judicial independence at the trial-court level. In advance of the conference, we will devote a special issue of *Court Review* to the topic. We hope you'll consider attending the conference (*see* the inside back cover for details) and will help us in our consideration of issues affecting judicial independence in the trial court. —SL

Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States, Canada, and Mexico. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of manuscripts for *Court Review* are set forth on page 26 of this issue. *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

Court Review is in full text on LEXIS and is indexed in the Current Law Index, the Legal Resource Index, and LegalTrac.

Letters to the Editor, intended for publication, are welcome. Please send such letters to *Court Review*'s editor: Judge Steve Leben, 100 North Kansas Avenue, Olathe, Kansas 66061, e-mail address: sleben@ix.netcom.com. Comments and suggestions for the publication, not intended for publication, also are welcome.

Photo credit: Mary S. Watkins (maryswatkinsphoto @earthlink.net). The cover photo is of the Kearney County Courthouse. Built in 1906 in Minden, Nebraska, its 100-foot dome is a landmark visible for miles.

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President's Column

Michael R. McAdam

As I wrote this, the National Center for State Courts had just completed the Eighth Court Technology Conference (CTC8) in Kansas City, Missouri. I was fortunate to be able to participate in CTC8 as your president and as a local host. My thoughts about CTC8 follow several lines of analysis, one about the role of technology in our courts, another about the impact of the National Center, and a third about the international nature of technology.

These were to be the primary subjects of this column until Roger Warren, president of the National Center, announced his resignation, effective summer 2004, at the National Center's board meeting in Washington, DC last November. This former California Superior Court judge from Sacramento has served with distinction and energy for the past eight years at the National Center, even though he committed to only five years of service when he moved his family east to Williamsburg, Virginia.

My involvement with the National Center had been limited until last year, when I made four separate trips to Williamsburg representing the AJA, as a participant on a panel on impaired driving and as your president. Each time I've been there, I've been impressed with the professionalism and expertise of the Center's staff in all departments. The universal attitude demonstrated by the employees I've encountered has been positive, friendly, and efficient. These values ultimately flow from only two sources—the individuals who work at the Center and their leader, Roger Warren. Even exemplary employees will eventually cut corners and settle for less if the leadership allows it. It's clear to me that Roger Warren set an example that didn't allow that to happen. Best wishes and good luck to you, Roger, in whatever challenges you pursue in the future.

The role of the National Center is a fitting topic for examination by the AJA. We, as an organization, rely on the Center's staff for research, advice, and administrative services, all of which are provided to the AJA at a cost that is not market-based. If we had to pay for these services "a la carte," we would not be able to remain in business. So, the National Center is a critical partner with the AJA. The AJA can never surrender its independence to another organization and our relationship with the National Center allows the AJA to maintain its ability to chart its own course for the benefit of its members. When the AJA participates in National Center events, as we did at CTC8, we get the benefit of the Center's cutting-edge involvement in technology without expending the enormous resources it would take to produce a similar program ourselves. The AJA's relationship with the National Center remains strong and will continue to grow under its new leadership.

About CTC8: it was a success with 97 vendors and 2,300 attendees from around the world. Judges, court administrators, and vendors came from 48 states and 30 nations on 5 continents. It was truly an international event. The AJA extended membership to every judge who attended CTC8 who was not already an AJA member. Also, every vendor at CTC8 was approached about displaying its products and services at the next AJA annual conference in San Francisco this October. These are contacts and connections that will prove to be invaluable in the future.

CTC8 did one more thing: it revealed to this non-technologically inclined judge that we, as judges, will be forever dependent upon technology, and blessed or cursed by it in ways that our judicial ancestors could not imagine. Issues of privacy, access, and judicial independence will become more common as executive-department computer programmers and legislative-branch budget experts and allied professionals will treat the judiciary as just another client, no different from the water department, the election commission, or the zoning board. It will be necessary to remind them that we represent the third branch of government and as such are to be accorded a much different status. There will be battles in the future to be fought along these lines. Some have already begun. The AJA needs to be in the forefront of this conflict, working on behalf of all judges.

A Court and a Judiciary That Is as Good as Its Promise

Kevin S. Burke

Editor's Note: These remarks, edited for publication, were given by Judge Kevin S. Burke on November 20, 2003 in the Great Hall of the Supreme Court, in ceremonies during which he received the 2003 William H. Rehnquist Award for Judicial Excellence.

The father of modern judicial administration, Professor Roscoe Pound, identified timeless tensions we face, including widespread misunderstanding of, and dissatisfaction with, the courts as well as with the other branches of government. A generation ago, Pound gave a famous speech entitled "The Causes of Popular Dissatisfaction with the Administration of Justice." Pound spoke of many things that contributed to the dissatisfaction he perceived during his time. While there have been enormous improvements in the structure of the administration of justice, a generation later we have not met the fundamental challenge of reducing the causes of popular dissatisfaction with justice.

Today the dissatisfaction with the administration of justice is at a level that none of us should tolerate or accept, for it threatens our democracy as much or more than any terrorist. The nation's dissatisfaction with the administration of justice is our issue of homeland security. In Pound's speech, he spoke first of the popular assumption that the administration of justice is an easy task to which anyone is competent. The fact that I am the recipient of the Rehnquist Award proves to many that Pound was correct.

Pound said a second factor that contributed to the dissatisfaction was the political jealousy that the other branches of government have with the judiciary due to the doctrine that courts have the final say in what the constitutional law is in our nation. Today it is fair to say that too many of our colleagues in the executive and legislative branches have many of the jealousies of their predecessors. Unfortunately, some political leaders are too easily prone to speak of judicial tyranny when there is mere disagreement with the outcome of a case.

Pound identified a third cause of dissatisfaction that he described as the sporting theory of justice. The sporting theory of justice is the view that essentially the legal process is two modern gladiators in a pitted war, with the role of the judge to be simply a referee for the combat. Even today the sporting theory of justice is so rooted in the legal profession in America that many of us take it for a fundamental legal tenet. Pound argued that the sporting theory of justice disfigures our judicial administration at every point. It leads the most conscientious judge to feel that he or she is merely to decide the contest, as attorneys present it, according to the rules of the game, and not to search independently for truth and justice. It leads attorneys to forget that they are officers of the court and to deal with the rules of law and procedure exactly as the professional football coach deals with the rules of the sport.

All of us—in the courts and the community at large—pay the price for misunderstandings about the courts. While I believe that there is far more trust and satisfaction with the court system than many of our critics would lead you to believe, it's easy to feel a bit under siege at times. We need to maintain perspective. Our nation has always been critical of the judiciary. Chief Justice Marshall, who today is revered, was nearly impeached in an effort fostered by Thomas Jefferson. Marshall, not having the benefit of a court public information officer, was forced to respond to critics by writing a series of letters to the editor in his own defense, using a pseudonym. Nearly a century later, President Theodore Roosevelt, upset with a ruling from the Supreme Court, said of Justice Oliver Wendell Holmes that he could carve out of a banana a judge with more backbone than the backbone of Oliver Wendell Holmes. Billboards populated the nation demanding the impeachment of Chief Justice Earl Warren. Former President Ford at one time wanted to impeach Justice William Douglas. Despite—and perhaps because of—criticism, the judiciary continues to thrive, change, and, I am hopeful, improve.

A factor that contributes to our generation's cause of popular dissatisfaction with the administration of justice is the way we conduct public debate on the issues of our time. Regrettably, too often the current method of policy disagreement is to take the other guy's idea, mischaracterize it, and announce your profound disagreement and outrage. Moreover, not only is our political rhetoric divisive, our nation is divided as well, which also contributes to the difficulty we have in responding effectively to the popular dissatisfaction with the administration of justice. The social historian Gertrude Himelfeld described us as "one nation, two cultures," one more religious, traditional, and patriotic, the other more secular, tolerant, and multicultural. It should be no surprise that a polarized nation is also conflicted when it comes to a vision for what the justice system should look like.

Learned Hand articulated a vision of justice and liberty that—despite our healthy and legitimate differences about how justice should be delivered—calls to mind some of our highest aspirations. On May 21, 1944, when the world faced many of the same kinds of challenges we face today, he asked:

> What, then, is the spirit of liberty? I cannot define it; I can only tell you my own faith:
>
> - The spirit of liberty is the spirit that is not too sure that it is right;
> - The spirit of liberty is the spirit which seeks to understand the minds of other men and women;
> - The spirit of liberty is the spirit

which weighs their interests alongside its own without bias.

When you think about what Hand said, he called on the best of our humanity when judges put on the robe—as much as he called on our judicial independence, our impartiality, and our ability to apply the law to the facts. Hand tried to tap the powers we *bring to the bench*, not just those that are *attributed to us on the bench*. If judges and lawyers are "not too sure we're right," we can be far more creative.

We can move away from the sporting theory of justice. Instead, whether we are judges, lawyers, or administrators, we must move from recycling problems toward resolving them with the best thinking of the courts and communities. We need to connect the resources within our communities, whether the issues are in drug court, mental health court, family court, or in how we respond to the issue of race and diversity. The courts of the future require partnerships with the other helping professions and the public at large.

I am not so naïve as to expect universal agreement on the issues that face the courts. We will and should have our disagreements on the vision of justice we each seek. But we must do so in a manner that fosters public confidence. Unfortunately, the judiciary and the leaders of the bar are at times contributing to the popular dissatisfaction with the administration of justice. Too often we forget Hand's admonition that the spirit of liberty is the spirit that is not too sure that it is right.

Morris Udall once said, "God give me the grace to make my words gentle and tender, for tomorrow I might eat them." In an era when the nation is so divided and its political leaders and pundits have an unhealthy tendency toward "gotcha" rhetoric, those of us affiliated with the judicial branch must model the behavior and rhetoric we hope for from the other branches of government. There will be vigorous dissents from appellate courts and spirited debate by court administrators and court leaders. Today more than ever, we must model our behavior and our debate of the issues that face the courts so that the other branches learn from our example. In the relationship judges have with court administrators and employees, we must remember we

were appointed, perhaps elected, but never anointed. The words of Morris Udall will serve the legal profession well.

The popular dissatisfaction with the administration of justice is not fueled just by rhetoric, but by performance. For some understandable reasons, courts have differentiated themselves from the private sector and its business practices. We say that courts neither control the influx of cases nor the laws that create them, that due process is intrinsically inefficient, and that the administration of justice is complex and, therefore, not amenable to modern management practices. The unfortunate consequence of these and other such arguments is that most courts can articulate what does not work, but have not designed quality initiatives that do work in what is asserted to be the unique culture of the court. Our challenge is made more difficult with the fiscal crisis that confronts too many state courts. However, a lack of money is not an excuse for a lack of ideas. We must be willing to innovate if we are to effectively address the popular dissatisfaction with the administration of justice.

Barbara Jordan once said, "What the people want is simple. They want an America as good as its promise." The same can be said of what this nation wants of its courts. They want a court—they want a judiciary—as good as its promise.

A court or a judiciary that is as good as its promise is known not just for speed and efficiency (heaven knows, we're good at that), but also for other, less quantifiable aspects of justice—things like fairness and respect, attention to human equality, a focus on careful listening, and a demand that people leave our courts understanding our orders. Courts cannot be satisfied with being quick. Nor can we be satisfied with being clever. We must strive to be fully just to every person who leaves the courthouse.

Last year there were nearly 90 million cases filed in the state courts. In Minnesota alone we had nearly two million cases. The volume of work makes individual attention to justice seem at times to be an unattainable goal and so we rest on measuring our speed. It has been said that what you measure is what you care about. To address the popular dissatisfaction with the administration of justice, courts and judges must measure and be accountable for the fairness of our actions.

Most importantly, we need to directly confront the notion that although judges at every level must be neutral, neutrality does not dictate that we mask that we care. Litigants and the community must know that the judges of our country care about them as individuals.

Several years ago, I sent a young African-American by the name of Isaac to prison. After his release, he was again convicted of a new drug offense. One afternoon I found Isaac outside my chambers. He was distraught and obviously angry. He told me that someone had taken a shot at his mother. If you knew Isaac's past, you would predict he'd seek revenge. Isaac's mother asked him to go see me. She said that she did not want to see him dead or in prison for the rest of his life. We talked and that day Isaac kept his mother's wish for him alive. Isaac did not seek revenge. Although I knew Isaac, I never met his mom. Somehow, however, she thought that the court was a place that cared.

A few months ago, a young African-American by the name of Adrian came to see me. He told me that he had been employed for two years, was drug free, and was living with his girlfriend. He wanted to get married, but his girlfriend said he had to resolve his anger issues with his mother first. Adrian had lived on the streets since he was 13. His mother was involved in prostitution and drugs. I had no answers for Adrian and told him so. He responded that he understood, but what he really wanted to talk about was not his relationship with his mother, but the fact that he had a younger brother who was 13. Adrian did not want him to grow up the same way he did. He thought he could find the answer in a conversation with a judge. Adrian believed the court was a place that cared.

On my desk I have a creature—an angel given to me by the mother of a boy named Christopher. Christopher was a little older than Isaac or Adrian. Christopher was white, middle class, and a heroin addict. Christopher's mom gave me a note and the creature to thank me for trying. Her son had stayed straight for four months, relapsed, and then died of an overdose. His mother thanked me for giving Christopher back to his family for those four months. Even though her son died and we failed her family, Christopher's mom thought that the court was a place where people cared.

It's not trite to say that the courts play an indispensable role in preserving democracy. They most definitely do. Any particular case we hear may not have great historical effect, but each case is a crucial human event. Taken together, the decisions we make day in and day out have the potential to affirm the public's faith in the strength of democracy—or to shake that faith. What the people want is simple. They want a court—they want a judiciary—as good as its promise.

Kevin S. Burke is chief judge of the Hennepin County District Court in Minneapolis. Appointed to the municipal court bench in 1984, he became a general-jurisdiction trial judge by court merger in 1986. He received the 2003 William H. Rehnquist Award for Judicial Excellence from the National Center for State Courts, having previously received the National Center's Distinguished Service Award in 2002. The Rehnquist Award is presented annually to a single trial judge who exemplifies the highest levels of judicial excellence, integrity, fairness, and professional ethics. Burke established the drug court in Minneapolis and has engaged in detailed studies of court fairness, including ones exploring what factors determine whether criminal defendants and victims believe a proceeding was fair. He is a 1975 graduate of the University of Minnesota School of Law, where he is an adjunct member of the faculty.

Judicial Report on the Adjudication and Sanctioning of Hard-Core Drinking Drivers

Robyn D. Robertson and Herb M. Simpson

Impaired driving is the most frequently committed crime in America. It has been an issue of debate and concern for the judiciary, as courtrooms across the country hear cases involving a majority of the 1.4 million annual DWI arrests. Since the early 1980s, concerned citizens have lobbied for and won considerable changes to the way these cases are approached from a public-policy perspective, often resulting in legislative initiatives and changes in criminal practice. Until now, however, little comprehensive research has been conducted on the implications of these system-wide changes for criminal justice professionals.

In December 2002, the Traffic Injury Research Foundation—an independent road safety institute—released a report concerning the adjudication of DWI cases and the sanctioning of hard-core drinking drivers.[1] Its findings were based on the views, insights, and opinions of more than 1,000 judges across the country. The report is part of a multiyear research initiative designed to improve the efficiency and effectiveness of the criminal justice system by highlighting key problems in each segment of the system and recommending practical, cost-effective solutions. Two earlier reports addressed problems in the detection and apprehension of hard-core drinking drivers,[2] and the prosecution of these offenders.[3] The foundation recently released the final report in July 2003, which addressed monitoring by probation and parole.[4]

In addition to funding provided by a charitable contribution from the Anheuser-Busch Companies, Inc., the involvement and participation of several thousand criminal justice professionals across the United States—representing law enforcement officers, prosecutors, judges, and probation and parole officers—made this unique initiative possible. By identifying key problems and recommending practical solutions derived from prior research and validated by the experiences of thousands of professionals participating in the study, the initiative underscores the need for systemic improvements. As a starting point, this series of reports serves as a valuable sourcebook. It provides direction to criminal justice and traffic safety professionals at national and state levels. It also guides agencies in addressing concerns and in strategically reviewing existing policies.

This research has received considerable support, cooperation, and interest from a wide variety of individuals as well as key national agencies. These groups include the Highway Safety Committee of the International Association of Chiefs of Police, the National Traffic Law Center of the American Prosecutors' Research Institute, the National District Attorneys Association, the National Association of Prosecutor Coordinators, the Conference of State Court Administrators, the American Judges Association, the National Judicial College, the National Center for State Courts, the American Probation and Parole Association, and the National Criminal Justice Association.

HISTORY OF THE PROBLEM

Significant reductions in impaired driving occurred during the 1980s and early 1990s. However, these declines stagnated in the mid-1990s. Today, approximately 40% of highway fatalities are still alcohol related. The recent increase in the number of alcohol-related fatalities reported by the National Highway Traffic Safety Administration in 2000 and 2002 indi-

Footnotes

1. Robyn D. Robertson & Herb M. Simpson, *DWI System Improvements for Hard Core Drinking Drivers: Sanctioning*, TRAFFIC INJURY RESEARCH FOUND. (2002), *available at http://www.trafficinjuryresearch.com/publications/PDF_publications/Sanctioning_Report.pdf*.

   Departments or agencies attempting to address any of these issues are encouraged to consult the study report. It contains extensive and detailed information on the problems identified and numerous examples, references, and contacts that agencies can draw upon for guidance. State-specific information can also be obtained, when available, upon request to TIRF. Copies of full reports and executive summaries for the enforcement, prosecution, and sanctioning phases can be accessed at www.trafficinjuryresearch.com or by contacting Barbara Koppe toll-free at 877-238-5235 or barbarak@trafficinjuryresearch.com.

2. Herb M. Simpson & Robyn D. Robertson, *DWI System Improvements for Hard Core Drinking Drivers: Enforcement*, TRAFFIC INJURY RESEARCH FOUND. (2001), *available at* http://www.trafficinjuryresearch.com/publications/PDF_publications/EnforcementReport.pdf.
3. Robyn D. Robertson & Herb M. Simpson, *DWI System Improvements for Hard Core Drinking Drivers: Prosecution*, TRAFFIC INJURY RESEARCH FOUND. (2002), *available at* http://www.trafficinjuryresearch.com/publications/PDF_publications/Prosecution_Report.pdf.
4. Robyn D. Robertson & Herb M. Simpson, *DWI System Improvements for Hard Core Drinking Drivers: Monitoring*, TRAFFIC INJURY RESEARCH FOUND. (2003), *available at* http://www.trafficinjuryresearch.com/publications/PDF_publications/Monitoring_Report.pdf.

cates that progress is now being eroded.[5]

The high-risk group of drinking drivers—referred to variously as hard-core drunk drivers, chronic drunk drivers, persistent drinking drivers, or drivers with high blood alcohol concentrations (BACs)—account for a large portion of the problem. Virtually all major government and not-for-profit agencies in the United States declared this dangerous group of offenders a national priority.

For judges, hard-core drinking drivers pose a significant threat because their alcohol tolerance and persistent behavior make them more difficult to sanction effectively and deter from drinking and driving. Moreover, their familiarity with the justice system allows them to manipulate the system's weaknesses and exploit its loopholes to avoid the appropriate sanction or conviction altogether. Of greater concern is the inability of courts to identify repeat DWI offenders, which is, in part, attributable to system-wide inconsistencies.

STUDY APPROACH

The project began with an extensive literature review to identify problems in the adjudication and sanctioning of repeat offenders. From this research, a list of priority problems was created and used as the basis for discussion in workshops in five states (Arizona, Connecticut, Illinois, Massachusetts, and New York). These workshops involved 22 limited and general jurisdiction judges, as well as some with specialized DWI caseloads, from 19 court jurisdictions. The goal of these workshops was to prioritize key problems identified in the research literature, gain further understanding of the magnitude and implications of these problems, and identify practical, cost-effective solutions supported by judges.

The results from the workshops were used to construct a nationwide survey to confirm the findings against a wider population and to obtain further information about such things as the frequency with which various problems are encountered. With the cooperation and assistance of the Conference of State Court Administrators, 900 judges from limited and general jurisdiction courts in 44 states were surveyed, making this one of the largest judicial surveys completed on DWI adjudication.

STUDY FINDINGS

The monitoring of offenders to ensure compliance with court-ordered sanctions and the highly technical and scientific evidence associated with DWI cases were identified by judges as primary concerns. They also reported that overlapping legal issues and the unprecedented growth in DWI legislation has made an already complicated system even more complex. In order of priority, judges nationwide identified the following problems:

1. Sentence monitoring;
2. Evidentiary issues;
3. Caseload;
4. Motions and continuances;
5. Failure to appear;
6. Records;
7. Sentencing disparity;
8. Mandatory minimum sentences; and
9. Juries.

In the remaining sections of this article, we present a detailed look at these top nine problems in terms of their magnitude, scope, consequences, and solutions.

Study findings indicate that many repeat offenders routinely fail to comply with the terms and conditions of their sentence, either in whole or in part.

1. Sentence Monitoring

The public often assumes that once a judge bangs the gavel and imposes a sentence it is the end of the story—the offender complies with the terms and conditions of his or her sentence. However, judges report that noncompliance is common. Some of the participating judges estimate that, in their jurisdictions, 40% of offenders never even report to the probation office—meaning that some of the terms and conditions of sentences never even begin. This phenomenon, however, should not be surprising considering that monitoring is a complex, demanding, and under-resourced task undertaken by multiple agencies.

Generally, several agencies share the responsibility for monitoring offender compliance—probation officers, various treatment and service providers, prosecutors, and courts. Probation officers are usually responsible for day-to-day physical monitoring of offenders, except in lower courts, where probation services are frequently nonexistent. Although probation practices vary from state to state, probation generally includes direct contact with offenders as well as gathering information from related agencies and service providers. In some states, officers regularly summarize this information, forwarding it to the appropriate judge for review and action. In other states, officers only produce reports after violations have occurred. In jurisdictions without probation services, judges are often required to ensure compliance.

In every jurisdiction, irrespective of its particular approach, judges possess the ultimate authority to ensure compliance. However, the inability to verify whether an offender completed his or her sentence makes it difficult for judges to effectively use their authority. Almost half of judges (48%) considered the lack of resources as a significant factor contributing to this problem. Other factors include heavy caseloads (43%), the lack of communication (31%), and inconsistent or delayed reporting (23%).

Study findings indicate that many repeat offenders routinely fail to comply with the terms and conditions of their sentence, either in whole or in part. Participating judges estimated that nationally approximately one-third of repeat offenders are returned to court for failure to comply with sanctions. Although this gives little indication of how often noncompliance by offenders is undetected, other findings suggest this

5. Press Release, U.S. Department of Transportation, DOT Releases Preliminary Estimates of 2001 Highway Fatalities (April 22, 2002).

Judges also indicated strong support for the expansion of problem-solving courts dealing with DWI issues.

behavior may be quite prevalent. For example, in Washington, judges ranked the monitoring of offenders as a relatively small concern. There, judges believed they were better able to identify noncompliant offenders—estimating that 45% of these offenders were returned to court. This suggests that noncompliance may be more prevalent in some jurisdictions than is currently estimated by judges, given the lower percentage nationally for offenders returned to court for noncompliance.

The inadequate monitoring of sentences has considerable consequences. Despite the development of sentences and strategies that are truly effective, these sanctions will not achieve their intended goal of changing offender behavior if offenders can successfully avoid participation and their non-compliance goes undetected. Furthermore, past experience with the justice system makes offenders savvy. They quickly learn that programs can be avoided without detection and this means that public safety is not protected as offenders continue to drink and drive with no substantial change in offending behavior.

A series of practical recommendations have been identified by judges to improve the monitoring of repeat offenders. Judges agree that the flow of information to judges needs to be streamlined and centralized through probation and parole officers so that monitoring by diverse agencies is synthesized and coordinated, and opportunities to file "petitions to revoke" are not overlooked. Depending on the jurisdiction, various agencies involved in the monitoring process (*e.g.*, treatment providers) may currently report directly and independently to the court, compounding the paperwork problem. Consequently, judges may have to review several reports from various agencies about one offender, complicating the monitoring process. Judges agree that forwarding this information to probation and summarizing it in a single report would facilitate the monitoring process. Also, relatively small changes to the reporting process, such as "flagging" reports of noncompliance, would enable judges to quickly identify cases requiring attention and action.

Consistent and frequent contact with offenders and better communication among the professionals involved (*e.g.*, judges, probation officers, and treatment providers) can significantly improve its effectiveness. Timely decision making and subsequent notification are essential to ensure that responsibilities are fulfilled. Judges acknowledge that this will require a concerted effort and immense cooperation from all agencies and will be difficult to accomplish under current caseloads and resource constraints. However, the benefits that will accrue make it an endeavor worth pursuing.

Judges also indicated strong support for the expansion of problem-solving courts dealing with DWI issues. Judges acknowledge these specialized courts increase opportunities for close supervision and offender accountability by streamlining the reporting process and centralizing the reporting effort into a single management information system with frequent progress reports to the judge. Despite some concerns that have been raised with regard to diverting resources from traditional courts to support specialized caseloads, and the potential conflict with constitutional principles,[6] there is strong belief in the efficacy of these courts.[7]

2. Evidentiary Issues

Judges expressed assorted concerns regarding the quality and quantity of evidence that is gathered and presented in DWI cases. Previous reports clearly illustrate the complexity of this multifaceted issue, particularly regarding the statutory requirements governing investigations and the subsequent collection of evidence.[8] Evidence that is not properly collected, documented, or presented in court significantly reduces the effectiveness of DWI adjudication.

It is imperative that police officers adhere to proper procedures and statutory requirements when evidence is collected and documented. Errors or omissions compromise the value of the evidence and can effectively limit what judges may consider at trial. Unfortunately, due to the dynamic nature of the arrest environment, a lack of training, and complicated statutory requirements, errors are not uncommon in DWI arrests. The presentation of evidence is also critical and judges report that inexperienced prosecutors may often overlook key evidence because of their unfamiliarity with DWI prosecutions and defense tactics. As evidence of this, more than one-third of judges believe that prosecutors do not have the same knowledge and expertise about DWI and related evidentiary issues as many defense attorneys, particularly those in private practice.

Regardless of the expertise of attorneys and potential failings at other phases of the system, judges must adhere to strict rules of evidence and procedure when adjudicating these cases, which limits their decision making to the consideration of specific facts. Judges may be obliged to dismiss charges in cases with evidentiary problems. They estimated that, nationwide, one in six repeat-offender cases is dismissed for these reasons. Evidentiary problems may also result in judges accepting "inequitable" plea agreements, excluding evidence or attributing it a lesser weight, or imposing a reduced sentence.

Judges are also concerned about the ability of defendants to refuse the evidentiary BAC test. These refusals impede the col-

6. *See* Morris B. Hoffman, *Therapeutic Jurisprudence, Neo-Rehabilitationalism, and Judicial Collectivism: The Least Dangerous Branch Becomes the Most Dangerous,* 29 FORDHAM URBAN L.J. 2063 (2002).
7. *See generally* Ralph K. Jones & John H. Lacey, *State of Knowledge of Alcohol-Impaired Driving: Research on Repeat DWI Offenders* (2000), *available at* http://www.nhtsa.dot.gov/people/injury/research/pub/dwioffend.pdf; Ann L. Keith, *Specialized and Problem-Solving Courts Trend in 2002: DUI Courts* (2002), *available at* http://www.ncsconline.org/WC/Publications/KIS_SpePro_Trends02DUI_Pub.pdf; Judge Jeff Tauber, *DUI/Drug Courts: Defining a National Strategy* (1999), *available at* http://www.ndci.org/dui.pdf.
8. Simpson & Robertson, s*upra* note 2; Robertson & Simpson, *supra* note 3.

lection of important evidence and can result in offenders avoiding a conviction in many instances. It has been established that BAC evidence is frequently the most compelling evidence and is often the only direct evidence of impairment.[9] Without this critical evidence, convictions are much more difficult to obtain because much of the other evidence is subjective in nature and open to opposing interpretations. Some judges view refusal as a direct violation of the implied consent laws and believe that permitting defendants to refuse only serves to further encourage this behavior, which compromises the safety of the driving public.

Judges have also expressed reservations about their ability to evaluate important evidence and make informed rulings on evidentiary motions. Many admit that their knowledge of certain scientific or technical evidence is limited. Eighty-six percent reported having insufficient knowledge about the science surrounding blood partition ratios; 75% reported having insufficient knowledge about the process of retrograde extrapolation of BACs; 65% reported having insufficient knowledge about accident reconstruction techniques; 48% reported being insufficiently knowledgeable about the accuracy of different types of BAC analysis; and 37% reported having inadequate knowledge about horizontal gaze nystagmus testing. Limited knowledge of these issues makes it more difficult for judges to evaluate adequately evidentiary motions filed by counsel or testimony provided by expert witnesses in court. However, even judges who possess considerable knowledge of these scientific issues and arguments are at a disadvantage if they rarely adjudicate DWI cases because the use and interpretation of scientific evidence is constantly evolving, which makes it difficult for them to remain current on these issues.

Furthermore, complex scientific arguments regarding the interpretation of evidence are more likely to occur in DWI cases involving serious bodily injury or death, making the consequences of insufficient knowledge even more significant. The problem can be further exacerbated by the fact that, in some states, lower court judges, particularly those presiding in municipal courts, are not attorneys. The lack of legal training may impede the ability of these judges to interpret technical and scientific evidence according to the applicable rules of evidence.

Judges proposed two key solutions to resolve the evidentiary problems identified in the adjudication process. They consistently endorsed more and continuing judicial education on DWI evidentiary issues in light of its highly technical and constantly evolving nature. DWI cases are some of the most difficult to adjudicate. Like homicides and sexual assaults, DWI cases involve complex and technical evidentiary issues. Although many specialized courses are available,[10] caseloads and resources often compromise opportunities for judicial participation.

Judges proposed two key solutions to resolve the evidentiary problems identified in the adjudication process.

A majority of judges recommend using legislation to address the persistent problem of offenders refusing an evidentiary breath test. Such legislation can ensure that vital BAC evidence is more consistently available. More than half of judges (55%) believe that criminalizing test refusal will have considerable benefits. Currently, only 11 states have taken the step to either criminalize refusals or make it a sentencing enhancement (Arkansas, California, Florida, Indiana, Minnesota, Nebraska, New Jersey, New York, Ohio, Rhode Island, Vermont), but this alternative is becoming more popular. Judges also recommend a variety of other legislative options, including increasing penalties to remove the current benefits of refusing (40%), admitting evidence of refusal in court (33%), and permitting forced blood draws (27%) when defendants refuse.

These approaches have already demonstrated success in some states. For example, in California, where officers can proceed with forced blood draws and test refusal is a sentencing enhancement, test refusal rates are less that 5%. This is less than the national refusal rate of 20%, and is substantially less than some states where refusal rates exceed 50%.[11]

As another option, judges support the reduction of the strict and burdensome statutory requirements for DWI investigations and arrests to simplify procedures so that evidence is not weakened or excluded due to technicalities. Certain features of problem-solving courts, such as highly experienced court officers, can also be valuable to address evidentiary issues since these officers are in many instances better able to evaluate and effectively adjudicate technical issues.[12]

3. Caseload

The "three-minute rule" is becoming more commonplace in courtrooms across the country, with some judges reporting that they process (through arraignments, pretrial hearings, and sentencing) as many as 200 cases a day. Three minutes is often all the time a judge may have to review a case before accepting a plea or imposing sentence. Although there are no national statistics that accurately quantify the number of DWI cases processed through the courts, it can be assumed that the large majority of the 1.4 million DWI annual arrests[13] end up in a courtroom. It is estimated that DWI cases comprise 10% of the

9. Simpson & Robertson, *supra* note 2.
10. The National Judicial College has implemented a course for new judges entitled "DUI Primer for Judges" beginning November 2003. For information see http://www.judges.org. The National Center for State Courts is also in the process of developing a DWI curriculum that can be used at the national and state levels. For information see http://www.ncsconline.org. The National Association of State Judicial Educators is currently developing a web-based learning program. For information see http://www.nasje.unm.edu.
11. Robertson & Simpson, *supra* note 3; Ralph K. Jones et al., *Implied Consent Refusal Impact*, Nat'l Highway Traffic Safety Admin. (1991).
12. Keith, *supra* note 7.
13. Federal Bureau of Investigation, *Uniform Crime Reports: Crime in the United States* (2000), *at* http://www.fbi.gov/ucr/cius_00/contents.pdf.

[J]udges have been inspired to find more creative ways to limit frivolous motions without assuming a "hard-line" approach.

criminal calendars of lower courts. In some states, percentages are as high as 40%.[14] This provides some indication of the volume of cases facing judges each year.

Caseloads are impacted not only by the total number of DWI cases, but also by the manner in which they are processed, or the amount of work involved. For example, some methods (*e.g.*, plea agreements) are more expedient and lead to resolution with minimal time and resources, whereas others (*e.g.*, jury trials) can remain on dockets for more than a year, contributing to caseload volume and creating backlogs. Cases that go to trial demand considerable time and attention, thereby reducing the judge's time to hear and process other cases. Over a fourth of judges indicated that heavy caseloads detract from the adjudication process by limiting the amount of time they have to thoroughly review cases before ruling. Despite judicial estimates that only 16% of all DWI cases result in a trial, two-thirds of judges reported that trial cases more often involve repeat offenders who have learned that system-wide problems significantly contribute to their chances for acquittal.

Insufficient time to review a case can result in inappropriate outcomes because judges may lack opportunities to review important evidence adequately and weigh it accordingly. This not only detracts from the deterrent effect of sanctioning but can also allow repeat offenders to avoid identification. Unfortunately, considerable pressure exists in most courtrooms to keep the flow of cases moving in a timely manner, and judges are often unable to review case files and records consistently to identify those hard-core offender cases that should receive greater attention. Heavy caseloads also limit opportunities for judicial education because judges are unable to get away from their heavy dockets. This in turn compounds existing evidentiary problems by making it more difficult for judges to acquire the technical expertise needed to adjudicate these cases.

Although 43% of judges agree that hiring more judges would alleviate caseload issues, most understand that this is unlikely to occur because of serious budgetary deficits. As a more realistic alternative, there is considerable support for the enhanced use of problem-solving courts and specialized DWI caseloads. Judges and prosecutors with specialized expertise facilitate more efficient and effective processing of cases and improve outcomes, despite the fact that typically more time may be spent with each offender. Judges believe these courts are better equipped to manage the volume of impaired driving cases because professionals rapidly develop familiarity with complex evidentiary issues, repeat offenders, and the use and availability of various alternative sanctions. In effect, these professionals can manage cases more efficiently than multiple judges sitting in traditional courts.

4. Motions and Continuances

Judges are accustomed to adjudicating a wide variety of motions, which are frequently supported by memoranda and other documents referencing relevant precedents. Motions have considerable implications for how a trial will proceed as well as its outcome. Not surprisingly, judges acknowledge that these motions can often be used in a "frivolous" manner both to complicate and to delay proceedings. Moreover, they are frequently used in cases involving repeat offenders or those involving serious injury or death.

Although evidentiary motions contribute to the fundamental fairness of the trial process by both balancing and limiting the evidence that may be considered, the overuse of motions can create an abuse of process by burdening opposing counsel with paperwork and placing considerable demands on a judge's time and court resources. More than one-third (34%) of judges in our survey reported that their ability to adhere to "case processing" guidelines (typically ranging from three to six months) is constrained by excessive motions. Furthermore, excessive motions increase processing delays that can ultimately result in unwarranted dismissals and acquittals, increased caseloads, and wasted resources. For this reason, it has been acknowledged that there is a need to restrict the excessive use of motions and continuances.

In response to this problem, some judges suggest strict adherence to case-processing guidelines, which limits the amount of time to resolve each case. Many judges are becoming proactive in this regard by making it clear to counsel that limited time is permitted to hear motions. They have also placed clear limits on the granting of continuances. Other judges have been inspired to find more creative ways to limit frivolous motions without assuming a "hard-line" approach. For example, Judge James Dehn of the 10th Judicial District of Minnesota has pioneered a program that requires the defendant to participate in pretrial home alcohol testing in lieu of maximum bail. Failure to test or a positive test results in the immediate arrest of the defendant. This program has proven to be an effective pretrial tool to decrease delays resulting from frivolous motions and continuances because many defendants do not stay sober while their case is pending. Independent research conducted by the Minnesota House of Representatives Research Department concluded that multiple benefits are associated with this program.[15]

5. Failure to Appear

Failing to appear for arraignment, trial, or sentencing is not uncommon for offenders seeking to avoid prosecution, conviction, or sanctioning. The prevalence of this behavior, which ranges from 10% to 30%, is often linked to the presence of surrounding borders with other states or counties. Nominal penalties and the difficulties associated with apprehending offenders once they have left the immediate jurisdiction encourage this behavior. Judges report that a lack of reciprocity exists among some neighboring jurisdictions and that war-

14. Interview with James Dehn, Judge, 10th Judicial District of Minnesota (2002).

15. Jim Cleary, *Staggered Sentencing for Repeat DWI Offenders: An Innovative Approach to Reducing Recidivism*, Minn. H.R. Research Dep't (2003), *available at* http://www.house.leg.state.mn.us/hrd/pubs/stagsent.pdf.

rants from other jurisdictions may be routinely ignored. Many district attorneys are also loath to initiate extradition proceedings for misdemeanor defendants because of competing priorities and fiscal restraints. Consequently, offenders are rarely returned to court and sanctioned for either the original DWI charge or the subsequent charge of failure to appear.

A majority of judges agree that failing to appear is more common among hard-core repeat offenders, who go to considerable lengths to avoid conviction. Savvy offenders know that police are unable to locate defendants quickly and that warrants are routinely purged from record systems in many states, allowing offenders to avoid prosecution and conviction. In addition, permanent records are rarely kept of an offender's failure to appear; therefore, there is no record of his or her propensity to fail to appear, leaving subsequent judges with no knowledge of this behavior.

More than one-third of judges (40%) strongly endorse making bond a condition of the arrest warrant issued for failure to appear. However, if constitutional considerations preclude the advance imposition of bond, at a minimum, instructions not to release the offender on recognizance should be clearly stated on the warrant to inform the arraigning judge of the offender's propensity for this behavior. One-quarter of judges recommend custody for offenders who have a predisposition for this behavior to ensure their appearance at trial. However, this is not always practicable in light of overcrowding issues that exist in many jurisdictions.[16] Yet efforts should be made to ensure custody, considering current rates of recidivism among this population.

6. Records

Current and accurate information is critical to judicial decision making. Judges rely on records in almost every stage of adjudication. Poor records impede the effectiveness of critical decisions at the pretrial, trial, and sentencing stages because judges often rely exclusively on the information contained in important records. The omission of prior convictions or sentences imposed in relation to specific charges makes it difficult for judges to determine the fairness of plea agreements. Knowledge of prior convictions is imperative to determine eligibility for diversion programs or whether elevated penalties are appropriate. Presentence reports often contain the most comprehensive information and assist the judge in identifying an appropriate sentence. However, these reports are not consistently available in many jurisdictions because of a lack of probation services.

Records—including driving and criminal history records, alcohol evaluations, and presentence reports—are maintained by different agencies, for different time periods. It has also been widely recognized that records, particularly criminal history and driver abstracts, vary in terms of the accuracy of information they contain. Inefficient access to relevant information further impedes decision making and the effective adjudication of these offenses.

Limited information may also result in offenders avoiding identification as a repeat offender, allowing them to avoid harsher sanctions typically imposed for repeat offenses. According to judges, repeat offenders with prior convictions in a different jurisdiction will typically plead guilty to new charges immediately in an attempt to resolve a case before their repeat offender status is discovered.

Savvy offenders know that police are unable to locate defendants quickly and that warrants are routinely purged . . . .

Currently, almost half of judges (44%) rely upon the National Driver Register (NDR) as an effective tool for identifying prior convictions. The information contained in this database is derived from reports forwarded from the licensing agencies of every state. However, the ability of state repositories to maintain accurate records is largely dependent on their ability to collect and enter pertinent information from multiple agencies (*e.g.*, police, courts) in real time. In some jurisdictions, it may take more than six months for arrests and convictions to be recorded. In other jurisdictions, convictions may be omitted entirely. Although the NDR database expedites the record-searching process, judges support the continued effort to improve the timeliness and quality of its information.

Judges also agree that state licensing agencies should produce standardized driver abstracts that are similar in content and structure to facilitate their review and admission in court proceedings. More than a third of the judges surveyed agreed that standardized driver abstracts are the best method to improve the utility of driving records and the sanctioning of hard-core drinking drivers.

7. Sentencing Disparity

Uniformity in sentencing is quite difficult to achieve despite the best efforts of the judiciary, particularly when an enormous number of judges are involved in the adjudication of these cases. Disparity frequently occurs because offenders possess diverse individual characteristics and judges are required to consider a wide range of aggravating and mitigating factors, including the seriousness of the offense, any injuries or fatalities, prior convictions, probation recommendations, alcohol evaluations, treatment history, social stability, and family issues.[17]

Even after accounting for these factors, however, real disparities still exist. Judges are often limited in what sanctions they can impose because of fiscal constraints. Indeed, more than 65% of judges reported that these concerns impact sentencing decisions. Furthermore, judges vary in their confidence with available sanctions, personal experience, the avail-

16. For a report on jail overcrowding see Mark A. Cunniff, *Jail Crowding: Understanding Jail Population Dynamics*, Nat'l Inst. of Corr., U.S. Dep't of Justice (2002), *available at* http://nicic.org/pubs/2002/017209.pdf.

17. Don M. Gottfredson, *Effects of Judges' Sentencing Decisions*, Nat'l Inst. of Justice (1999), *available at* http://www.ncjrs.org/pdffiles1/nij/178889.pdf.

[E]xisting research substantiates the belief that incarceration is not as effective as previously believed.

ability of sanctioning options, and the resources required to support sanction alternatives.

Regardless of the reason it occurs, disparity in sentencing can result in inappropriate sanctions and reduce the likelihood of behavior change—*i.e.*, offenders will be more likely to recidivate. More importantly, disparity often leads to "judge-shopping," where offenders seek to have their case adjudicated by a judge who is perceived to be more lenient. Defendants familiar with the system quickly learn what "standard" penalties individual judges impose in DWI cases and will attempt to mitigate their punishment to the extent possible. Nearly half (46%) of judges report that judge-shopping occurs occasionally or often.

To reduce sentencing disparity, judges need a greater familiarity with the "what works" literature that evaluates the effectiveness of various sanctioning methods. Improved access to this scientific literature will enable judges to develop a more uniform body of knowledge to draw upon when making sentencing decisions. A majority of judges (80%) agree that brief summaries containing scientific evaluations of the effectiveness of various sanctions would be advantageous in making effective sentencing decisions. This uniformity of knowledge could also lead to reductions in disparity and lower recidivism rates.

Many judges (74%) agree that the development and implementation of tiered penalties in states where they do not currently exist could reduce disparity. Tiered penalties specify a reasonable range of penalties that may be ordered, while still accommodating discretionary decision making based on individual circumstances. With a tiered system, judges will also be able to impose more appropriate penalties for repeat offenders than are currently possible in some states.

8. Mandatory Minimum Sentences

Mandatory minimum sentences stipulate the nature and level of sanctions that are to be imposed for certain offenses. Although the intention of these sentences was to bring consistency and uniformity to sentencing, judges believe that, in some instances, minimums may have had the opposite effect. There is some evidence that minimums detract from the effectiveness of sentencing when mandated sanctions are either inappropriate or inapplicable. For example, it is not unusual for some repeat offenders to be excluded from minimums because of certain policies and requirements. Moreover, loopholes in penalty legislation make them confusing to apply and judges must often resort to subjective interpretations to determine their application. Also, regardless of the decision made by the sentencing judge, there may be limited resources to carry out the sentence.

The composition and structure of mandatory minimum sentences can compromise their effectiveness in a variety of ways. The most notable example involves mandatory incarceration for brief periods. Unfortunately, many jurisdictions suffer from jail overcrowding so many offenders are never required to serve their sentences. This is just one example of the many "unfunded mandates" that judges cannot enforce. Ignition interlocks are often mandatory for repeat offenses but there may be no service provider available to install this device, making compliance impossible. Many jurisdictions report long waiting times for admission to treatment programs, and those offenders with a history of violence (due to alcohol or drugs) are often ineligible. Driving suspensions or revocations can also be circumvented in jurisdictions where "hardship" licenses are available or the lack of alternative means of transportation make noncompliance inevitable.

The legislation mandating these minimums may also be sufficiently vague to result in the inconsistent interpretation of legislative requirements, meaning that minimums may not be uniformly applied. One judge succinctly described the problem, stating, "I have no problem with mandatory minimums, but I have a hard time figuring out when they apply."[18]

Unfortunately, the provisions contained in mandatory minimum sentences are often not reflective of the current state of knowledge regarding sanction effectiveness, and do not accommodate jurisdictional considerations, the policies of respective sanctioning programs, or budgetary constraints. Perhaps of greatest concern is that a lack of resources leads to the inconsistent use of minimums and erodes the certainty of appropriate punishment. This reduces the likelihood that sanctions will produce the desired behavior change or deter recidivism. It also undermines public confidence in the system.

Judges recommend the review and enhancement of mandatory minimums to include more alternative and creative sentencing options. A more progressive attitude toward sanctioning has evolved among the judiciary and existing research substantiates the belief that incarceration is not as effective as previously believed.[19] Programs including greater supervision for persistent offenders and access to meaningful treatment are recommended by judges as well as other innovative programs that demonstrate significant reductions in recidivism.

Judges also recommend a legislative review to update and clarify existing legislation in order to promote and encourage greater consistency in the use of mandated sanctions. The vague language currently used in many statutes is of particular concern because it requires judges to rely on subjective and conflicting interpretations. Any new legislation or language revisions should be sufficiently precise to close loopholes and prevent the circumvention of penalties. Perhaps most important is the recommendation that appropriate resources be allocated to ensure that programs and facilities will be able to accommodate sentenced offenders. Mandated sanctions are meaningless if there are no facilities or service providers to deliver programs.

18. Survey Responses from Judges Attending the Minnesota Annual Judges Conference, Bloomington Marriot, Bloomington, Minnesota (Dec. 9, 1999).

19. NORVAL MORRIS & MICHAEL TONRY, BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENT IN A RATIONAL SENTENCING SYSTEM (1990).

9. Juries

A final issue of concern to judges involves the availability of jury trials in DWI cases. Judges report that repeat offenders are more likely to elect a jury trial, particularly in cases involving serious injury or death, because of the potential for extended incarceration. Aside from delaying a case several months (due to the time it takes to reach trial on the jury docket and impanel suitable jurors), offenders making this election also benefit from lower conviction rates insofar as DWI jury trials result in fewer convictions than jury trials involving other criminal cases—60% and 75%, respectively.

A primary concern with jury elections is that jurors are often unable to evaluate critical and scientific evidence based on legal rules and are more likely to reach inappropriate verdicts. It is the experience of many judges that juries tend to make assumptions about the evidence that are incorrect. Oftentimes, the prosecution has no recourse to correct these errors. Also, despite the dramatic change in social attitudes toward impaired driving that has been achieved in the past two decades, offenders occasionally benefit from the sympathetic mind-set of jurors.

Permitting offenders to elect jury trials, particularly for misdemeanor offenses, impedes the effectiveness of the justice system. Not only do jury elections permit offenders to avoid sanctioning, but the lack of consequences does little to deter impaired driving or change problem behavior. These trials also tend to exacerbate caseloads and waste scarce court resources.

As a solution to this problem, a majority of judges (75%) agree that evidence of test refusal should be admissible at trial in an effort to balance current inequities in the process. A limited number of judges (only 25%) believe that jurors should be made aware of prior convictions as well. The inclusion of this critical evidence would permit juries a more accurate depiction of important facts and circumstances with which to weigh evidence, and likely result in the rendering of more appropriate verdicts. Finally, it has been suggested that jury trials be eliminated as an option for lesser or misdemeanor offenses in order to streamline processing and reduce caseloads.

SUMMARY

Our series of reports clearly demonstrates how the unprecedented growth in DWI legislation in the past two decades has resulted in a complex and cumbersome system. At each phase, criminal justice professionals operate amidst a myriad of competing priorities and conflicting interests. Police officers strive to establish probable cause, whereas prosecutors must prove their cases beyond a reasonable doubt. Judges can only admit evidence that meets rigorous standards and must become experts in a wide variety of scientific areas. Despite these problems, the system does work, with an average of 1.4 million offenders being arrested annually. Much needed legislation has been drafted, implemented, and is already in place in a majority of states. Now, politicians should turn their attention to ensuring that important policies and programs achieve their intent and make the system work more efficiently and effectively. If we are to change problem behavior and protect public safety, we must ensure that guilty offenders are apprehended, prosecuted, convicted, sanctioned, and monitored.

Dedicated professionals across the country have provided the information needed to redress existing flaws in the form of practical and cost-effective recommendations. Criminal justice agencies and associations need to take action to ensure that these recommendations are carried forwarded and implemented in a meaningful fashion. Only then will we see the type of reductions in alcohol-related fatalities that occurred in the 1980s.

On a positive note, many agencies and associations are now modifying existing training programs, developing new curricula, and reexamining current policies and practices to identify ways they can collaborate to close loopholes and improve the efficiency and effectiveness of the system. A key ingredient in achieving this goal is the development of cooperative initiatives to improve communication and share information. Key stakeholders from government, criminal justice, and highway safety arenas are encouraged to become involved in the process of reviewing current practices at a state level and determining where problems exist and what improvements can be made.

Increasing efforts to raise awareness and promote educational initiatives should be a primary concern. The success of these efforts can be enhanced through greater communication and information-sharing among stakeholders. Most importantly, all of the agencies that have a vested interest in achieving reductions should participate in the review process to ensure that outcomes will produce results in the form of reductions in alcohol-related fatalities.

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Recent Criminal Decisions of the United States Supreme Court:
The 2002-2003 Term

Charles H. Whitebread

In criminal cases, this term of the United States Supreme Court had several important decisions, but no landmark cases. The Court continued to favor law enforcement. One significant development was the substantial impact of section 2254(d) of the Antiterrorism and Effective Death Penalty Act is having in closing the door of federal courts to state prisoners petitioning for the writ of habeas corpus. Here are several of the important criminal decisions decided this term.[1]

FOURTH AMENDMENT: ILLEGAL DETENTION AND COERCED CONFESSIONS

The Court, per curiam, in *Kaupp v. Texas*,[2] determined that a suspect's "detention" in the middle of the night by a cohort of police officers without an arrest warrant or any probable cause is sufficiently similar to an arrest to warrant suppression of his confession under the Fourth Amendment. The suspect was awoken in the middle of the night by police officers, taken from bed to the scene of the crime, and then taken to the sheriff's headquarters. There, he was given his *Miranda* warnings and questioned. He eventually confessed to participating in the crime. The detectives acted on a "pocket warrant;" they did not seek a conventional arrest warrant because they did not believe that they had sufficient evidence for probable cause. The confession was allowed into evidence at trial and the petitioner was convicted. Reversing and remanding the decision, the court stated, "Although certain seizures may be justified on something less than probable cause, . . . [the Court has] never 'sustained against Fourth Amendment challenge the involuntary removal of a suspect from his home to a police station and his detention there for investigative purposes . . . absent probable cause or judicial authorization."

FIFTH AMENDMENT: POLICE INTERROGATION

Justice Thomas announced the judgment of the Court in *Chavez v. Martinez*.[3] Here, the court found that the petitioner failed to state a cause of action under 42 U.S.C. section 1983 for violation of his Fifth Amendment right against self-incrimination when he was coercively interrogated, but was never prosecuted for a crime, let alone compelled to be a witness against himself in a criminal case. Petitioner was shot during an altercation with two police officers and was questioned, without the benefit of *Miranda*, in the emergency room of a hospital prior to and during his treatment for two gunshot wounds, which left him paralyzed and blind. The Fifth Amendment, made applicable to states through the Fourteenth Amendment, requires that "no person . . . shall be compelled *in any criminal case* to be a *witness* against himself." The court concluded that there was no Fifth Amendment violation because there was no "criminal case" to trigger the Fifth Amendment's guarantee against self-incrimination. Thomas writes that a "criminal case . . . requires the initiation of legal proceedings;" the Fifth Amendment protection is a "trial right." The Court, however, remands the case to determine whether or not petitioner has unsuccessfully stated a claim for violation of his Fourteenth Amendment substantive due process rights.

FIFTH AMENDMENT: INVOLUNTARY DRUG ADMINISTRATION TO CRIMINAL DEFENDANTS

In *Sell v. United States*,[4] a 6-3 Court, in an opinion written by Justice Breyer, held that the involuntary administration of drugs to an individual accused of a crime to make him competent to stand trial does not violate that individual's Fifth Amendment "liberty" rights provided that it is necessary to achieve important governmental trial-related interests. The Court looked to two prior cases to reach this conclusion, *Washington v. Harper*,[5] and *Riggins v. Nevada*.[6] In *Harper*, the Court held that "the Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest." While the Court recognized "that an individual has a 'significant' constitutionally protected 'liberty interest' in 'avoiding the unwanted administration of antipsychotic drugs,'" the Court determined that the state's interest was "legitimate" and "important" allowing such treatment when the inmate poses a threat to himself or others. In *Riggins*, the Court "repeated that an individual has a constitutionally protected liberty 'interest in avoiding involuntary administration of antipsychotic drugs'—an interest that only an 'essential' or 'overriding' state interest might overcome." It also "suggested that, in principle, forced medication in order to render a defendant competent to stand trial for murder was constitutionally permissible."

Footnotes

1. For a more in-depth review of the decisions of the past term, *see* CHARLES H. WHITEBREAD, RECENT DECISIONS OF THE UNITED STATES SUPREME COURT, 2002-2003 TERM (Amer. Acad. of Jud. Educ. 2002).
2. 123 S. Ct. 1843 (2003).
3. 123 S. Ct. 1994 (2003).
4. 123 S. Ct. 2174 (2003).
5. 494 U.S. 210 (1990).
6. 504 U.S. 127 (1992).

The Court surmised that these two cases "indicate that the Constitution permits the Government to involuntarily administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternative, is significantly necessary to further important governmental trial-related interests." The Court enumerated a four-part test. First, there must be an "important governmental interest" at stake. Second, "the court must conclude that involuntary medication will significantly further those concomitant state interests," *i.e.*, "administration of the drugs is substantially likely to render the defendant competent to stand trial." Third, "the court must conclude that involuntary medication is *necessary* to further those interests," that "alternative, less intrusive treatments are unlikely to achieve substantially the same results." And last, "the court must conclude that administration of the drugs is *medically appropriate*, *i.e.*, in the patient's best medical interest in light of his medical condition."

FIFTH AMENDMENT: DOUBLE JEOPARDY AND CAPITAL PUNISHMENT PROCEEDINGS

Addressing the issue of double jeopardy, the Court, in *Sattazahn v. Pennsylvania*,[7] held double jeopardy was not a bar when a defendant is sentenced to death at retrial after having been sentenced to life at the initial trial pursuant to a state law that mandates a life sentence when a jury is deadlocked on the issue of sentencing. In this case, after the guilt phase of the trial, a trial for the penalty phase was held. The jury could not reach a decision and defendant moved under Pennsylvania law that the jury be discharged and that the court enter a sentence of life imprisonment. The judge entered the required life sentence. Defendant then appealed to the Pennsylvania Superior Court, which concluded that the trial judge had incorrectly instructed the jury on several offenses, including the first-degree murder charge. The Superior Court reversed and remanded the case. On remand, Pennsylvania filed a notice of intent to seek the death penalty. In addition to the aggravating circumstance alleged at the first sentencing, the notice also alleged another aggravating circumstance—his newly acquired felony record from his various guilty pleas at the first trial. Defendant moved to prevent the state from seeking the death penalty and was denied. The Superior Court and the Pennsylvania Supreme Court affirmed the denial. At the second trial, defendant was convicted and sentenced to death.

In a 5-4 decision, delivered by Justice Scalia, the Court held that there was no double jeopardy bar to Pennsylvania's seeking the death penalty on retrial. Under the Double Jeopardy Clause of the Fifth Amendment "no person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb." Along with reliance on other cases, the Court cited to *Stroud v. United States*,[8] where it recognized, as here, "[When a] defendant is convicted of murder and sentenced to life imprisonment, but appeals the conviction and succeeds in having it set aside . . . jeopardy has not terminated, so the life sentence imposed in connection with the initial conviction raises no double jeopardy bar to a death sentence on retrial." The Court rejected defendant's contention that due to the unique treatment afforded capital-sentencing proceedings under *Bullington v. Missouri*,[9] double-jeopardy protections were raised when the jury deadlocked at his first sentencing proceedings and the court prescribed a sentence of life imprisonment pursuant to Pennsylvania law. The Court maintained that the automatic life sentence pursuant to Pennsylvania law is not an acquittal, and the Court noted that the Pennsylvania Supreme Court found no statutory intent to the contrary. Finally, the Court also rejected defendant's claim Fourteenth Amendment due process violation, finding nothing indicated that any "life" or "liberty" interest that Pennsylvania law gave defendant after the first trial was "somehow immutable."

"[T]he Constitution permits the Government to involuntarily administer antipsychotic drugs to a mentally ill defendant . . . in order to render that defendant competent to stand trial . . . ."

SIXTH AMENDMENT: INEFFECTIVE ASSISTANCE OF COUNSEL

In *Wiggins v. Smith*,[10] Justice O'Connor wrote the opinion for the 7-2 Court. In this case, the Court determined that the test for ineffective assistance of counsel, under *Strickland v. Washington*,[11] requires trial counsel to fully investigate a defendant's life history when trial counsel has reason to believe those facts might lead to mitigation in a death penalty action. During the sentencing phase of a trial, petitioner's trial counsel indicated to the jury that they would hear evidence in mitigation that petitioner "has had a difficult life." However, no evidence was presented during the proceedings. Trial counsel had some knowledge of petitioner's background, but not the full picture. Petitioner sought post-conviction relief, challenging "the adequacy of his representation at sentencing, arguing that his attorneys had rendered constitutionally defective assistance by failing to investigate and present mitigating evidence of his dysfunctional background."

The Court first recognized that its consideration of Wiggins's claim was controlled by the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, which limits their analysis "to the law as it was 'clearly established' by our precedents at the time of the state court's decisions." In *Strickland v. Washington*,[12] the Court established the legal rules governing an ineffective assistance of counsel claim. The petitioner must show: (1) "counsel's performance was deficient;"

7. 123 S. Ct. 732 (2003).
8. 251 U.S. 15 (1919).
9. 451 U.S. 430 (1981).
10. 123 S. Ct. 2527 (2003).
11. 466 U.S. 668 (1984).
12. 466 U.S. 668 (1984).

[A] prison sentence of 25 years to life, imposed for the offense of felony grand theft under the three-strikes law, was not . . . in violation of the Eighth Amendment's prohibition . . . .

and (2) "the deficiency prejudiced the defense." Although the Court has not specified guidelines for deficient performance, it has stated that to show deficient performance "a petitioner must demonstrate that counsel's representation 'fell below an objective standard of reasonableness.'" In this case, trial counsel "attempt to justify their limited investigation as reflecting a tactical judgment not to present mitigating evidence at sentencing and to pursue an alternate strategy instead." The Court concluded, however, that the trial counsel's failure to investigate more fully into petitioner's background "fell short of the professional standards that prevailed in Maryland in 1989."

EIGHTH AMENDMENT: SENTENCING AND THREE-STRIKES LEGISLATION

In *Ewing v. California*,[13] a 5-4 decision, the Court determined that a prison sentence of 25 years to life, imposed for the offense of felony grand theft under the three-strikes law, was not grossly disproportionate and in violation of the Eighth Amendment's prohibition on cruel and unusual punishments. Under California law, grand theft is considered a "wobbler," meaning it is presumptively a felony, but at the discretion of the trial court, may be reduced to a misdemeanor. In this case, although the defendant asked the court to reduce the conviction for grand theft to a misdemeanor so as to avoid a three-strikes sentence, or alternatively to exercise its discretion to dismiss the allegations of some or all of his prior serious or violent felony convictions, the trial court refused and defendant was sentenced to 25 years to life under California's three-strikes legislation.

The Court, in upholding the sentence, first considered the reasoning in Justice Kennedy's concurring opinion in *Harmelin v. Michigan*:[14] "The Eighth Amendment, which forbids cruel and unusual punishments, contains a 'narrow proportionality principle' that 'applies to noncapital sentences.'" The Court also looked to *Rummel v. Estelle*,[15] where it "held that it did not violate the Eighth Amendment for a State to sentence a three-time offender to life in prison with the possibility of parole." The Court cited *Rummel* for the proposition that "'federal courts should be reluctant to review legislatively mandated terms of imprisonment, and that successful challenges to the proportionality of particular sentences should be exceedingly rare.'"

Turning to its seemingly contrary decision in *Solem v. Helm*,[16] in which the Court held unconstitutional the sentence of life without the possibility of parole for the seventh in a string of nonviolent offenses, the Court noted that in applying the three factors relevant to the determination of whether a sentence is so disproportionate that it violates the Eighth Amendment, the *Solem* Court struck down the sentence, but specifically noted the contrast between that sentence and the sentence in *Rummel*, where the defendant was eligible for parole. Furthermore, the *Solem* Court specifically declined to overrule *Rummel*. Considering three-strikes legislation on a more general note, the Court concluded, "We do not sit as a 'superlegislature' to second-guess these policy choices. It is enough that the State of California has a reasonable basis for believing that dramatically enhanced sentences for habitual felons 'advances the goals of [its] criminal justice system in any substantial way.'"

FEDERAL HABEAS CORPUS: ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT

In *Lockyer v. Andrade*,[17] a 5-4 Court in an opinion written by Justice O'Connor, held that the Ninth Circuit erred in ruling that the lower court's affirmation of respondent's sentence for two consecutive terms of 25 years to life for two counts of theft totaling less than $200 in videotapes was contrary to, or an unreasonable application of, Supreme Court precedent under section 2254(d)(1) of the Antiterrorism and Effective Death Penalty Act of 1996. California's three-strikes law mandates that any felony can constitute the third strike and can subject a defendant to a term of 25 years to life in prison. Respondent received such a sentence. Reviewing respondent's habeas corpus petition, the Ninth Circuit, looking to *Rummel v. Estelle*,[18] *Solem v. Helm*,[19] and *Harmelin v. Michigan*,[20] concluded that both *Rummel* and *Solem* remained "good law" and were "instructive in *Harmelin's* application." It stated that because the California Court of Appeals compared the facts of Andrade's case to the facts of *Rummel*, but not *Solem*, the state court unreasonably applied clearly established Supreme Court law. In addressing the threshold matter of what constitutes clearly established federal law, the Court noted that, according to *Williams v. Taylor*,[21] it can only be the holdings and not the dicta of Supreme Court decisions at the time of a state court's ruling. The Court conceded that this case was difficult because Supreme Court holdings on this issue had not been "a model of clarity." The Court stated, "Through this thicket of Eighth Amendment jurisprudence, one governing legal principle emerges as 'clearly' established under § 2254(d)(1): A gross disproportionality principle is applicable to sentences for terms of years." However, the Court concluded, "The only relevant clearly established law amenable to the 'contrary to' or 'unreasonable application of' framework is the gross disproportionality principle, the precise contours of which are unclear, applicable only in the 'exceedingly rare' and 'extreme' case."

13. 123 S. Ct. 1179 (2003).
14. 501 U.S. 957 (1991).
15. 445 U.S. 263 (1983).
16. 463 U.S. 277 (1983).
17. 123 S. Ct. 1166 (2003).
18. 445 U.S. 263 (1980).
19. 463 U.S. 277 (1983).
20. 501 U.S. 957 (1991).
21. 529 U.S. 362 (2000).

The final question for the Court was whether the California Court of Appeals decision affirming Andrade's sentence was "contrary to, or involved an unreasonable application of," this disproportionality principle. Here, the Court made two points. First, the Court concluded that because *Harmelin* and *Solem* specifically stated that they did not overrule *Rummel*, it was not contrary to the Court's clearly established law for the California Court of Appeals to turn to *Rummel* in deciding whether a sentence was grossly disproportionate. Further, *Harmelin* allows a state court to reasonably rely on *Rummel* in determining whether a sentence is grossly disproportionate. Therefore, the Court concluded, the California Court of Appeals decision was not "contrary to" the governing legal principles set forth in these cases.

EX POST FACTO CLAUSE: STATUTE OF LIMITATIONS

Justice Breyer delivered the opinion of the 5-4 Court in *Stogner v. California*.[22] Here, the Court held that the California statute resurrecting an otherwise time-barred criminal prosecution, which was enacted after the pre-existing statute of limitation had run, violated the *Ex Post Facto* Clause of the United States Constitution. The California statute at issue permits "prosecution for those crimes where 'the limitations period specified in [prior statutes of limitations] has expired' – provided that (1) a victim has reported an allegation of abuse to the police, (2) 'there is independent evidence that clearly and convincingly corroborates the victim's allegation,' and (3) the prosecution is begun within one year of the victim's report." A related provision provides "that a prosecution satisfying these three conditions 'shall revive any cause of action barred by [prior statute of limitations].'"

The Constitution has two *Ex Post Facto* Clauses, Article I, section 9, clause 3, which applies to the federal government, and Article I, section 10, clause 1, which applies to states. Both prohibit the governments from "enacting laws with certain retroactive effects." The Court recognized three effects of the California statute: (1) it creates a "new criminal limitations period that extends the time in which prosecution is allowed;" (2) it authorizes "criminal prosecutions that the passage of time had previously barred;" and (3) it was enacted after the statute of limitations had run for the crime for which petitioner was prosecuted. The Court concluded that these three effects rendered the statute invalid under the *Ex Post Facto* Clause. First, the Court concluded that the statute "threatens the kind of harm that . . . the *Ex Post Facto* Clause seeks to avoid:" "the Clause protects liberty by preventing governments from enacting statutes with 'manifestly *unjust and oppressive*' retroactive effects." Second, the Court determined that "the kind of statute at issue falls literally within the categorical description of *ex post facto* laws set forth by Justice Chase more than 200 years before in *Calder v. Bul*.[23] The Court stated: "[A] statute of limitations reflects a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict . . . . Consequently, to resurrect a prosecution after the relevant statute of limitations has expired is to eliminate a currently existing conclusive presumption forbidding prosecution, and thereby to permit prosecution on a quantum of evidence where that quantum, at the time the new law is enacted, would have been legally insufficient."

[I]ts retroactive application does not violate the *Ex Post Facto* Clause.

EX POST FACTO CLAUSE: ALASKA SEX OFFENDER REGISTRATION ACT

In *Smith v. Doe*,[24] a 6-3 Court held that the Alaska Sex Offender Registration Act of 1994 is nonpunitive and its retroactive application does not violate the *Ex Post Facto* Clause. On May 12, 1994, Alaska enacted the Alaska Sex Offender Registration Act. This law contains two components, which are both retroactive. The Act requires any "sex offender or child kidnapper who is physically present in the state" to register, either with the Department of Corrections, if the individual is incarcerated, or with the local law enforcement authorities if the individual is at liberty. He must provide name, aliases, identifying features, address, place of employment, date of birth, conviction information, information about personal transportation, post-conviction treatment history, and other such information. The second component is the public release of this information. Respondents brought actions under Rev. Stat. section 1979, 42 U.S.C. section 1983, seeking to declare the Act void under the *Ex Post Facto* Clause of Article I, section 10, clause 1, of the Constitution and the Due Process Clause of section 1 of the Fourteenth Amendment. The Court began its analysis by noting that this was the first time that it has considered a sex offender registration law against *Ex Post Facto* Clause protection, but that the framework for the Court's inquiry is well established: first, the Court must determine "whether the legislature meant the statute to establish 'civil' proceedings;'" second, "if the intention of the legislature was to impose punishment, that ends the inquiry. . . . However, [if] the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is 'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.' . . ." Furthermore, because the Court ordinarily defers to the legislature's stated intent, "'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.'"

Reviewing legislative history, the Court concluded that "nothing on the face of the statute suggests that the legislature sought to create anything other than a civil . . . scheme designed to protect the public from harm." Next, the Court considered whether the Act imposes an "affirmative disability or restraint" and concluded that it did not. The Court reasoned that the Act imposes no physical restraint, which is the affirmative example. Further, "[t]he Act's obligations are less harsh than the sanctions of occupational debarment, which we have held to be nonpunitive." In rejecting the Ninth Circuit's contention that the updating of the sex offender's information

22. 123 S. Ct. 2446 (2003).
23. 3 U.S. 386 (1798).
24. 123 S. Ct. 1140 (2003).

Chief Justice Rehnquist . . . held the Hobs Act and RICO may not be applied to anti-abortion activist organizations . . . .

poses a restriction and that the Act resembles a probation scheme, the Court reasoned that the sex offender does not have to update in person, and that "offenders subject to the Alaska statute are free to move where they wish and to live and work as other citizens, with no supervision." The Court also rejected Doe's assertion that the length of the reporting time was not proportional to the severity of the offense and is retributive.

FOURTEENTH AMENDMENT DUE PROCESS: SEX OFFENDER REGISTRY

In *Connecticut Department of Public Safety, et al. v. John Doe*,[25] a unanimous Court, in an opinion written by Chief Justice Rehnquist, held that Connecticut's sex offender registry program was not a violation of the Fourteenth Amendment Due Process Clause. The Connecticut law requires all persons convicted of (a) a criminal offense against a minor, (b) violent or nonviolent sexual offenses, or (c) felonies committed for a sexual purpose, to register with the Connecticut Department of Public Safety upon their release. The registry requires names, addresses, photographs, and DNA samples, as well as updated photographs and notification of changes in address. All registry postings must include a warning that those who use the registry improperly (as in to harass) will be subject to prosecution. Reversing the lower courts, the Court determined that there was no due process violation because the Fourteenth Amendment does not require an opportunity to prove a fact not material to the statutory scheme, *i.e.*, a hearing first to determine whether or not the class members are "particularly likely to be currently dangerous before being labeled as such by their inclusion in a publicly disseminated registry." Citing to *Paul v. Davis,*[26] the Court stated "that mere injury to reputation, even if defamatory, does not constitute the deprivation of a liberty interest." Furthermore, the Court distinguished both *Wisconsin v. Constantineau,*[27] and *Goss v. Lopez*,[28] which cumulatively require the Government to provide hearings to prove or disprove certain facts, stating, "[h]ere, however, the fact that respondent seeks to prove—he is not currently dangerous—is of no consequence. . . . [a]s the DPS Website explains, the law's requirements turn on an offender's conviction alone—a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest."

CRIMINAL STATUTORY INTERPRETATION: ARBITRATION AGREEMENT—RICO

In *Pacificare Health Care Systems, Inc. v. Book*,[29] Justice Scalia wrote the opinion, and all other justices joined, except for Justice Thomas, who took no part in the decision. Here, the Court held that it would be premature for the it to address the issue of whether an arbitration agreement that contains a punitive damages restriction is unenforceable with regards to a parties' claim for treble damages under RICO because it was unclear whether the provision did and would actually be applied to the RICO claims by the arbitrator. The arbitration agreements in this action contained clauses limiting the award of punitive damages. Respondent opposed arbitration because "the arbitration provisions prohibit an award of punitive damages," and "respondents could not obtain 'meaningful relief' in arbitration for their claims under the RICO statute, which authorizes treble damages." The Court wrote that neither "precedents" nor "the ambiguous terms of the contracts" necessitate that these "provisions preclude an arbitrator from awarding treble-damages under RICO." The Court noted that its prior cases "have placed different statutory treble-damages provisions on different points along the spectrum between purely compensatory and strictly punitive awards." The Court stated that if the contractual ambiguity, itself, were a "gateway" question, then there would be no question about its ability to decide the issue. However, the ambiguity as to the language and how the arbitrator will construe the remedial provisions, and whether this will render the "agreements unenforceable," is "unusually abstract." Therefore, "the proper course is to compel arbitration."

STATUTORY INTERPRETATION: HOBBS ACT AND THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT (RICO)

In *Scheidler v. National Organization for Women*,[30] petitioners presented an argument alleging that respondents "were members of a nationwide conspiracy to 'shut down' abortion clinics through a pattern of racketeering activity that included actions of extortion in violation of the Hobbs Act." Chief Justice Rehnquist, writing for the Court, held the Hobbs Act and RICO may not be applied to anti-abortion activist organizations or individuals because such groups or individuals do not "obtain" property in a manner necessary for a predicate act of extortion. The Court began its analysis with the assertion that it "need not now trace what are the outer boundaries of extortion liability under the Hobbs Act, so that liability might be based on obtaining something as intangible as another's right to exercise exclusive control over the use of a party's assets . . . [for] [w]hatever the outer boundaries may be, the effort to characterize petitioners' actions here as an 'obtaining of property from' respondents is well beyond them." The Court performed an analysis of the statutory language. Beginning with the common-law definition of extortion according to William Blackstone, the Court then noted that the Hobbs Act retained the requirement that statutory language that property must be "obtained." Further, "[e]liminating the requirement that property must be obtained to constitute extortion would not only conflict with the express

25. 123 S. Ct. 1160 (2003).
26. 424 U.S. 693 (1976).
27. 400 U.S. 433 (1971).
28. 419 U.S. 565 (1975).
29. 123 S.Ct. 1531 (2003).
30. 123 S. Ct. 1057 (2003).

requirement of the Hobbs Act, it would also eliminate the recognized distinction between extortion and the separate crime of coercion."

With this judicial history, the Court noted that it was significant that Congress deliberately omitted coercion in the drafting of the Hobbs Act. The Court also recognized its own decision in *United States v. Teamsters,*[31] in which the Court created an exception in the Anti-Racketeering Act that Congress decided to replace with the Hobbs Act, but still omitted coercion. The Court then resolved an apparent contradiction in its own history. Under *United States v. Culbert*,[32] the Court stated "that the words of the Hobbs Act 'do not lend themselves to restrictive interpretation,'" and under *United States v. Enmons,*[33] in which the Court stated that since the Hobbs Act was a criminal statute ambiguity must be resolved in favor of lenity. To this the Court asserts that, under *McNally v. United States*,[34] when there are two possible interpretations of a criminal statute, only with definite language from Congress can a court choose the harsher interpretation. Hence, "[i]f the distinction between extortion and coercion, which we find controls these cases, is to be abandoned, such a significant expansion of the law's coverage must come from Congress, and not from the courts." Addressing the issue of state extortion charges, the Court reasons that "[b]ecause petitioners did not obtain or attempt to obtain respondents' property, both the state extortion claims and the claim of attempting or conspiring to commit state extortion were fatally flawed." Because all of the predicate acts supporting the jury's finding of a RICO violation must be reversed, the judgment that the petitions violated RICO must also be reversed.

SUBSTANTIVE CRIMINAL LAW: NINTH CIRCUIT'S "AUTOMATIC TERMINATION" OF A CONSPIRACY

In *United States v. Jimenez Recio*,[35] the Court held the Ninth Circuit was incorrect in its view that a conspiracy ends through "defeat" when the Government intervenes and makes the conspiracy's goals impossible to achieve, even if the conspirators do not know that the Government has intervened. On November 18, 1997, police stopped a truck in Nevada. They found, and seized, a large stash of illegal drugs, and with the help of the truck's two drivers they set up a sting. The Government took the truck and the drivers to the truck's original destination, where the drivers engaged a contact who said he would send someone to get the truck. Three hours later, the two defendants arrived at the truck's location and drove the truck away from the location. Police arrested the two men. The Ninth Circuit agreed by a panel vote of 2 to 1 that *United States v. Cruz*[36] was binding law. In *Cruz*, the Ninth Circuit wrote that a conspiracy terminates when "there is affirmative evidence of abandonment, withdrawal, disavowal or defeat of the object of the conspiracy." The Ninth Circuit reached this conclusion after considering the conviction of an individual who had joined a conspiracy to distribute drugs after the Government had seized the drugs. The Circuit court found that the Government's seizure of the drugs guaranteed the "defeat" of the conspiracy's object, so the individual who had joined after that point could not be convicted of conspiracy.

The Court has repeatedly stated that the essence of conspiracy is "an agreement to commit an unlawful act."

The Court began its analysis by stating of the Ninth Circuit's holding that a conspiracy continues "until there is affirmative evidence of abandonment, withdrawal, disavowal or defeat of the object of the conspiracy," with the "defeat of the object" being the critical portion. The Ninth Circuit clearly intended that the government ends a conspiracy by stopping it even for conspirators who are totally unaware that the government has made the object of the conspiracy impossible to achieve. The Court stated that, in its view, this is incorrect. First, the Court said the Ninth Circuit's conclusions were inconsistent with the "proper view of the law." The Court has repeatedly stated that the essence of conspiracy is "an agreement to commit an unlawful act." Furthermore, a conspiracy agreement is "a distinct evil," which "may exist and be punished whether or not the substantive crime ensues." Last, a "conspiracy poses a 'threat to the public' over and above the threat of the commission of the relevant substantive crime—both because the 'combination in crime makes more likely the commission of [other] crimes' and because it 'decreases the probability that the individuals involved will depart from their path of criminality.'" The Court stated "[t]hat being so, the Government's defeat of the conspiracy's objective will not necessarily and automatically terminate the conspiracy." The Court noted that almost all "courts and commentators" endorse the view of the Court in its holding in this case.

FEDERAL HABEAS CORPUS: ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT AND CERTIFICATE OF APPEALABILITY

In *Miller-El v. Cockrell*,[37] the Court determined that, under the Antiterrorism and Effective Death Penalty Act when a court of appeals is considering issuing a certificate of appealability to a habeas applicant, the court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims, and the prisoner seeking the certificate of appealability need only demonstrate "a substantial showing of the denial of a constitutional right."[38] The Court took note of the requirements for the granting of a certificate of appealability, which is necessary for a federal court of appeals to have jurisdiction to rule on the merits of appeals from habeas petitioners: such a certificate can be issued only if the requirements of section 2253 have been met. Under section 2253(c), a petitioner must make a "substantial showing of the denial of a constitutional

31. 315 U.S. 521 (1942).
32. 435 U.S. 371 (1978).
33. 410 U.S. 396 (1973).
34. 483 U.S. 350 (1987).
35. 123 S. Ct. 819 (2003).
36. 127 F.3d 791 (9th Cir. 1997).
37. 123 S. Ct. 1029 (2003).
38. 28 U.S.C. § 2253(c)(2).

[T]he Court held that an ineffective-assistance-of-counsel claim may be brought in a collateral proceeding . . . regardless of whether the petitioner could have raised the claim on direct appeal.

right." As it did in *Barefoot v. Estelle*,[39] the Court determined that for a requisite showing, the petitioner must "show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement.'" The Court noted that "[t]his threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims." Furthermore, the Court declared that "[w]hen a court of appeals side steps this process by first deciding the merits of an appeal, and then justifying its denial of a [certificate of appealability] based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction."

FEDERAL HABEAS CORPUS: 28 U.S.C. SECTION 2254(D)

In *Price v. Vincent*,[40] a unanimous Court held a habeas petitioner whose claim was adjudicated on the merits in state court was not entitled to relief in a federal court unless he meets the requirements of 28 U.S.C. section 2254(d). Respondent filed a habeas petition under section 2254(d), which included a double jeopardy claim that rested on the same facts presented in his state court appeal. The Court concluded, therefore, he was not entitled to review unless he could demonstrate the state court's adjudication of his claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." A state court's decision is only "'contrary to' our clearly established law if it 'applies a rule that contradicts the governing law set forth in our cases' or if it 'confronts a set of facts that are materially indistinguishable from a decision of the Court and nevertheless arrives at a result different from our precedent.'" Additionally, the state court's decision is only "an unreasonable application of clearly established law" if "the state court applied [that case] to the facts of his case in an objectively unreasonable manner." In this case, the Court said neither had occurred.

HABEAS CORPUS: INEFFECTIVE-ASSISTANCE-OF-COUNSEL CLAIMS

In *Massaro v. United States*,[41] Justice Kennedy delivered the opinion for a unanimous Court. Here, the Court held that an ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under section 2255, regardless of whether the petitioner could have raised the claim on direct appeal. The Court began its analysis by noting that under *United States v. Frady*[42] and *Bousley v. United States*,[43] "claims not raised on direct appeal may not be raised on collateral review unless the petitioner shows cause and prejudice." However, the "procedural default rule is neither a statutory nor a constitutional requirement, but it is a doctrine adhered to by the courts to conserve judicial resources and to respect the law's important interests in the finality of judgments." The Court reasoned that by requiring ineffectiveness-of-counsel claims be lodged on direct appeal, it would be forcing the claimant to raise the issue before there has been an opportunity to fully develop the factual predicate, and it would be a forum not best suited to asses the facts: "When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose."

FEDERAL HABEAS CORPUS: INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL

Addressing the issue of ineffective assistance of counsel in *Woodford v. Visciotti*,[44] the Court found that the California Supreme Court did not err in its application of *Strickland v. Washington*,[45] and also correctly applied the "unreasonable application clause" of 28 U.S.C. section 2254(d). The California Supreme Court did not dispute that respondent's counsel was constitutionally inadequate during the sentencing phase, but concluded that it did not prejudice the jury's sentencing decision. In *Strickland*, the Court held that to prove prejudice the defendant must establish a "reasonable probability" that, but for the counsel's unprofessional errors, the result of the proceeding would have been different. It also specifically rejected the proposition that the defendant had to prove it more likely than not that the outcome would have been altered.

In determining that the California Supreme Court erred in its application of *Strickland*, the Ninth Circuit read the California court's opinion as applying the latter test—requiring respondent to prove, by a preponderance of evidence, that the result of the sentencing proceeding would have been different. The Court noted that the state supreme court "painstakingly" cited and applied *Strickland*, but that the Ninth Circuit fixed on three occasions where the state court shortened the phrase "reasonably probable" to "probable" without the modifier. The Court concluded, "Its occasional shorthand reference to that standard by use of the term 'probable' without the modifier may perhaps be imprecise, but if so, it can no more be considered a repudiation of the standard than can this Court's own occasional indulgence in the same imprecision." The Ninth Circuit also concluded that the state court's determination that

39. 463 U.S. 880 (1983).
40. 123 S.Ct. 1848 (2003).
41. 123 S. Ct. 1690 (2003).
42. 456 U.S. 152 (1982).
43. 523 U.S. 614 (1998).
44. 123 S. Ct. 357 (2002).
45. 466 U.S. 668 (1984).

respondent suffered no prejudice *was* "objectively unreasonable." To this assertion, the Court responded that in its opinion, the Ninth Circuit ruled contrary to the standard set out in 28 U.S.C. section 2254(d). The Court concluded that the Ninth Circuit substituted its own judgment for the state court's judgment by ignoring the crucial distinction between "an unreasonable application of federal law" from an "incorrect application of federal law."

FEDERAL HABEAS CORPUS: SECTION 2254(A)

In *Early v. Packer*,[46] a per curiam decision, the Court reversed the decision of the Ninth Circuit granting a petition for a writ habeas corpus, under 28 U.S.C. section 2254(a), as incorrect on the grounds that the court of appeals wrongly concluded that the state court's decision contradicted federal law. The petitioner filed for a writ after conviction in state court, alleging the trial judge improperly instructed the jury by urging the jury to assess the facts and apply them to the law as he stated it and asking for a count of the jury, which resulted in an 11 to 1 tally. The Court first concluded that, contrary to the Ninth Circuit's opinion, it was not necessary for a state court to cite to federal precedent in its decision. Second, it also concluded that the state court did not improperly apply the totality of circumstances test set forth in *Lowenfield v. Phelps*.[47] Finally, the Court concluded that the Ninth Circuit improperly relied on *Jenkins v. United States*[48] and *United States v. United States Gypsum Co.*,[49] which the Ninth Circuit interpreted to protect a defendant from the trial court urging jurors to reach any verdict, not just protecting him from a trial court urging a particular type of verdict. The Court responded that "[n]either *Jenkins* nor *Gypsum Co.* is relevant to the § 2254(d)(1) determination, since neither case sets forth a rule applying to state-court proceedings." The Court found that both cases reversed convictions based on jury instructions given in federal prosecutions, and that "neither opinion purported to interpret any provision of the Constitution. . . . [so that] the Ninth Circuit erred by relying on those nonconstitutional decisions."

FEDERAL HABEAS CORPUS

Seeking to secure uniformity among the circuit courts, a unanimous Court, in *Clay v. United States*,[50] held that for the purpose of 28 U.S.C. section 2255's one-year limitation period, a judgment of conviction becomes final when the time expires for filing a petition for certiorari. Justice Ginsburg, writing for the Court, said, "Because 'we presume that Congress expects its statutes to be read in conformity with this Court's precedents,'[51] our unvarying understanding of finality for collateral review purposes would ordinarily determine the meaning of 'becomes final' in § 2255." According to precedent, "Finality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires. . . ."

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46. 123 S. Ct. 362 (2002).
47. 484 U.S. 231 (1988).
48. 380 U.S. 445 (1965).
49. 438 U.S. 422 (1978).
50. 123 S. Ct. 1072 (2003).
51. *United States v. Wells*, 519 U.S. 482, 495 (1997).

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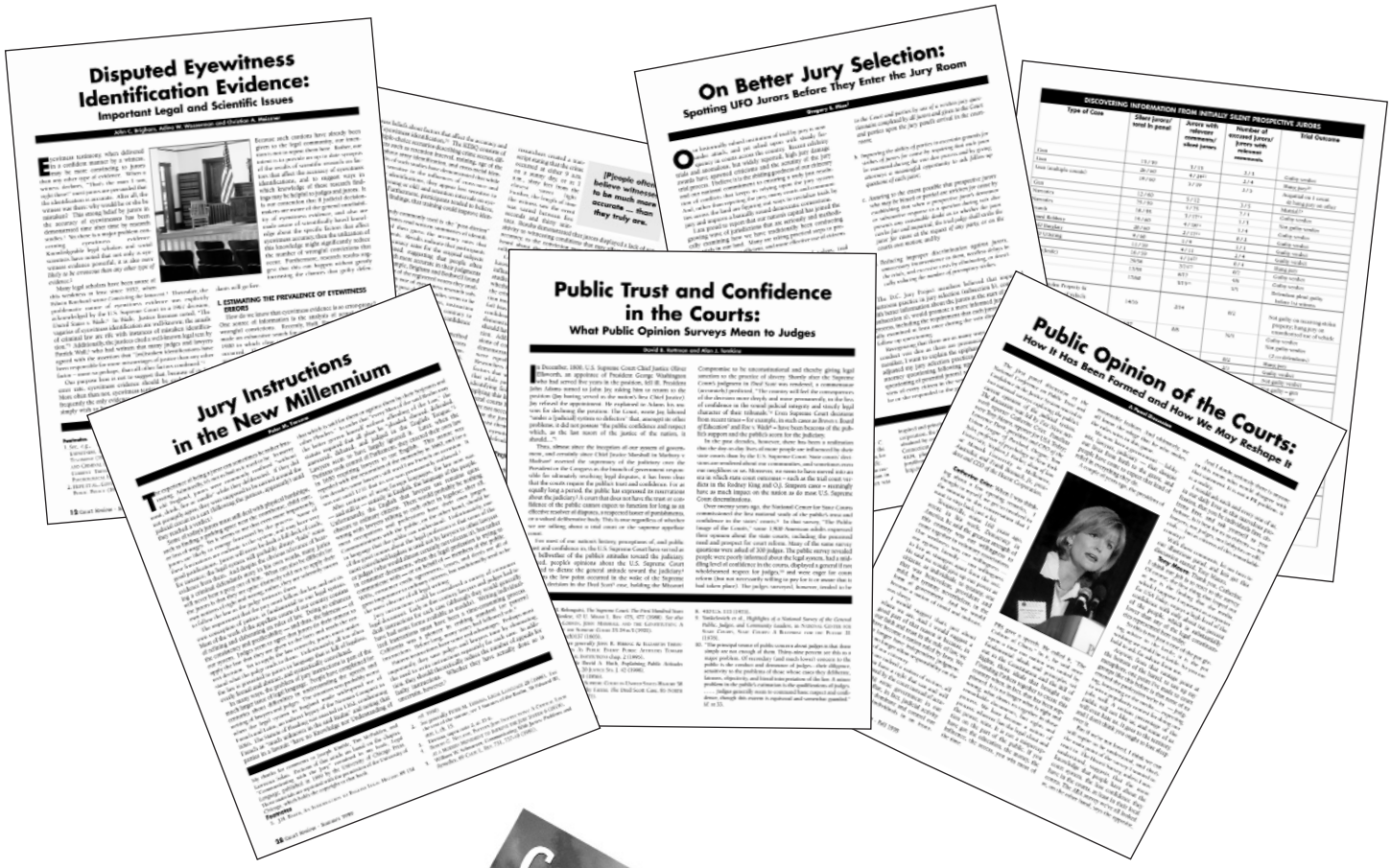
THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION



Court Review, the quarterly journal of the American Judges Association, seeks to provide practical, useful information to the working judges of the United States, Canada, and Mexico. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work.

Court Review is indexed in the Current Law Index, the Legal Resource Index, and LegalTrac.

Court Review invites the submission of unsolicited, original articles, essays, book reviews, and letters to the editor. Submissions and inquiries may be sent to *Court Review*'s editor: Judge Steve Leben, 100 North Kansas Avenue, Olathe, Kansas 66061, e-mail address: sleben@ix.netcom.com. Comments and suggestions for the publication, not intended for publication, also are welcome.

Court Review Author Submission Guidelines

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Court Review is received by the 2,500 members of the American Judges Association (AJA), as well as many law libraries. About 40 percent of the members of the AJA are general jurisdiction, state trial judges. Another 40 percent are limited jurisdiction judges, including municipal court and other specialized court judges. The remainder include federal trial judges, state and federal appellate judges, and administrative law judges.

Articles: Articles should be submitted in double-spaced text, with citations in footnotes, in either Word or WordPerfect format. The suggested article length for *Court Review* is between 18 and 36 pages of double-spaced text (including the footnotes). Footnotes should conform to the 17th edition of *The Bluebook: A Uniform System of Citation*. Articles should be of a quality consistent with better state bar association law journals and/or other law reviews.

Essays: Essays should be submitted in the same format as articles. Suggested length is between 6 and 12 pages of double-spaced text (including any footnotes).

Book Reviews: Book reviews should be submitted in the same format as articles. Suggested length is between 3 and 9 pages of double-spaced text (including any footnotes).

Pre-commitment: For previously published authors, we will consider making a tentative publication commitment based upon an article outline. In addition to the outline, a comment about the specific ways in which the submission will be useful to judges and/or advance scholarly discourse on the subject matter would be appreciated. Final acceptance for publication cannot be given until a completed article, essay, or book review has been received and reviewed by the *Court Review* editor or board of editors.

Editing: *Court Review* reserves the right to edit all manuscripts.

Submission: Submissions may be made either by mail or e-mail. Please send them to *Court Review*'s editor: Judge Steve Leben, 100 North Kansas Avenue, Olathe, Kansas 66061, e-mail address: sleben@ix.netcom.com, (913) 715-3822. Submissions will be acknowledged by mail; letters of acceptance or rejection will be sent following review.

FUTURE AJA CONFERENCES

2004 Annual Conference
San Francisco, California
October 24-29
Grand Hyatt San Francisco
$159.00 single/double

2005 Midyear Meeting
Sanibel Island, Florida
May 12-14
Sundial Beach Resort
$125.00 single/double

2005 Annual Conference
Anchorage, Alaska
September 18-23
Hotel Captain Cook
$135.00 single/double

2006 Midyear Meeting
Coeur d'Alene, Idaho
May 18-20
Coeur d'Alene Resort
$130 deluxe room;
$160 premier room

2006 Annual Meeting
New Orleans, Louisiana
Hotel Monteleone
$169 single/double

2007 Midyear Meeting
Newport, Rhode Island

2007 Annual Conference
Vancouver, British Columbia

COMING SOON . . .
2004 AJA MEMBERSHIP CAMPAIGN

MEMBER-GET-A-MEMBER CAMPAIGN

GRAND PRIZE:

Free Trip and
Registration to 2005
Conference in Alaska!

WATCH FOR INFORMATION IN THE SUMMER 2004 ISSUE OF BENCHMARK AND IN YOUR MAIL.

NOTICE

As of July 1, 2004, the American Judges Association is suspending all prior programs under which a first-year membership was provided without charge.

The Resource Page

NEW BOOKS

JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS. BRUCE J. WINICK & DAVID B. WEXLER, EDS. Carolina Academic Press, 2003 ($45). 352 pp.

Professors David Wexler and Bruce Winick have provided the intellectual framework for problem-solving courts with what they coined "therapeutic jurisprudence." They have collected a well-balanced set of articles exploring how principles of therapeutic jurisprudence have been applied in the courts in this book.

As Wexler and Winick note, the U.S. Conference of Chief Justices (CCJ) and Conference of State Court Administrators (COSCA) adopted a resolution in 2000 endorsing "broad integration over the next decade of the principles and methods employed in the problem-solving courts into the administration of justice to improve court processes and outcomes while preserving the rule of law, enhancing judicial effectiveness, and meeting the needs and expectations of litigants, victims and the community." This book helps to set out both the general principles and their application in a variety of contexts.

Separate chapters explore drug courts, domestic-violence courts, mental-health courts, youth courts, and re-entry courts. Articles examine how to use sentencing powers to reduce recidivism, how domestic-violence court judges can be effective as risk managers, and how to apply the principles of therapeutic jurisprudence to the appellate courts.

Wexler and Winick have perhaps been more aggressive in promoting scholarship in the discipline they have created—therapeutic jurisprudence—than anyone else in the history of legal scholarship. Literally hundreds of articles are in print, and many of them were specifically recruited or encouraged by Wexler or Winick or both. In this book, they have collected some of the best, emphasizing those that would be of practical help to judges trying to explore or apply these principles. They also include some of their own essays, and a thorough listing of other references.

The CCJ/COSCA resolution encouraging the broad use of these principles indicates widespread interest and potential. This book will help that potential to be realized.

E-NEWSLETTER ON PROBLEM-SOLVING COURTS

The National Center for State Courts has a new, quarterly electronic newsletter on problem-solving courts. Called *Problem-Solving Reporter*, the quarterly newsletter tracks how courts are using problem-solving or therapeutic jurisprudence methods.

The first issue of *Problem-Solving Reporter* focuses on DUI courts. A brief summary of a comprehensive study of the effectiveness of the court system in handling hard-core drunk drivers in Colorado indicates several problems, tracking some of those listed in the article in this issue by Robyn Robertson and Herb Simpson (*see* page 8). There is also a more detailed review of the Anchorage, Alaska, wellness court, which has implemented drug-court principles in the handling of DUI offenders. In an interview, District Judge James Wanamaker of Anchorage provides a detailed review of conditions he places on offenders, including the use of Naltrexone, a drug that reduces cravings for alcohol.

OTHER E-NEWSLETTERS

The National Center for State Courts has seven other e-newsletters which you can sign up for at http://www.ncsconline.org/Newsletters/NCSC_newsletters.htm.:

- *Jur-E Bulletin*, a newsletter concerning jury management;
- *The Public Trust*, about initiatives that may help to increase public trust and confidence in the judiciary;
- *Family Violence Forum*, on judicial actions to reduce family violence;
- *Federal Funding Report*, a newsletter with tips and strategies courts can use to obtain federal or private grants;
- *Center Court*, providing general news for the state-courts community;
- *International Program Brief*, which covers international justice issues; and
- *Mark Your Calendar*, which provides information about events and stories of potential interest.

PROPOSED REVISIONS TO CODE OF JUDICIAL CONDUCT

The American Bar Association's Joint Commission to Evaluate the Model Code of Judicial Conduct has published a preliminary draft of revised Canons 1 and 2 to the Code. Those drafts are available for review at http://www.abanet.org/judicialethics/drafts.html.

Judges involved in problem-solving courts may want to review the proposals and provide suggestions to the Commission. A May 11, 2004 memo from Mark Harrison, chair of the Commission, specifically invites public comment in this area:

> [M]any persons appearing before the Commission, as well as Commission members, have concerns that the present draft (and the present Model Code) does not address sufficiently certain types of communications that are encouraged or required of a judge in the course of his or her service on "specialized courts," such as drug courts, domestic abuse courts, etc. Comments on this subject from judges and others who are knowledgeable about the operations of specialized courts will be greatly appreciated.

Comments and suggestions regarding these drafts are being accepted until July 15, 2004. The preferred means of comment is by e-mail to ABA staff member Eileen Gallagher at gallaghE@staff.abanet.org. Comments may also be sent mail to Ms. Gallagher at 321 N. Clark Street, Chicago, Illinois 60610.